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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 547

M. P. HOWLETT, INC.,

Petitioner,

against

The Tug MICHAEL MORAN, TUG MICHAEL MORAN, INC., and MORAN TOWING & TRANSPORTATION CO., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

M. P. Howlett, Inc., prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit, entered on April 16, 1970, reversing the judgment of the United States District Court for the Southern District of New York, in favor of petitioner for damages sustained due to the capsizing of petitioner's crane barge while in the custody of respondents' tugboat.

Citations to Opinions Below

The opinion of the United States District Court for the Southern District of New York, printed in the appendix herein (*Infra*, pp. 1a-8a)* is not yet officially reported, but

* Numerical references followed by "a" are to the Appendix.

is reported unofficially at 1970 American Maritime Cases 790. The opinion of the Court of Appeals for the Second Circuit, printed in the appendix herein (*Infra*, pp. 9a-18a) is reported at 425 F. 2d 619 (1970).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 16, 1970 (19a). A timely petition to the Court of Appeals for rehearing *in banc* was denied by orders entered herein on June 2, 1970 (*Infra*, pp. 20a-21a).

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented

1. Whether the Court of Appeals extended its scope of review of the District Court's findings under Rule 52(a) of the Federal Rules of Civil Procedure beyond the limits prescribed in *McAllister* v. *United States*, 348 U. S. 19.

2. Whether the Court of Appeals was justified in foreclosing the District Court's consideration of other claims of negligence by petitioner against respondents, which the District Court found unnecessary to decide.

Statement of the Case

Respondents' tug had towed petitioner's non-self-propelled crane barge to her berth at Pier 9, Weehawken, New Jersey. Since sea water had entered the stern compartment of the crane barge, it was sinking by the stern upon arrival at the berth at about 9:15 p.m. The tug

engineer and deckhand allegedly spent about twenty minutes in attempting to remove a manhole cover to the stern compartment with the use of a crowbar and a maul or sledge hammer. They were unable to remove the cover, allegedly due to hardened cement around the cover. The attempts to remove this manhole cover were made so the tug could insert her pump into and hopefully pump the flooded stern compartment, thereby avoiding or delaying the subsequent capsizing.

The District Court found that by 9:35 p.m., it was obvious that the cover could not be removed, and that with the stern already awash, pumping would most probably either not take place or not be effective. Thereafter, the tug captain took no action whatsoever with respect to the crane barge, other than to attempt unsuccessfully to reach the petitioner by land telephone and make telephone calls to his dispatcher. At 11:15 p.m., petitioner's crane barge capsized at her berth.

Petitioner called two tugboat captains as experts who testified that it would have been feasible to beach the crane barge by pushing the barge to a nearby mud flat, thereby avoiding the subsequent capsizing, and that such action was required by prudent seamanship. (Respondents called no experts, but chose to rely solely upon the self-serving testimony of the tug captain.) The District Court found that the tug captain was negligent in failing to beach the crane barge during the considerable period of time between 9:35 p.m., when efforts to open the stern manhole cover ceased, and 11:15 p.m., when the crane capsized.

The majority opinion of the Court of Appeals reversed the decision of the District Court, because it was not persuaded by the testimony of petitioner's experts that a reasonably prudent tug captain would be expected to beach petitioner's crane barge under the circumstances existing at the time of the accident. Judge Friendly, in his dissent-

ing opinion, perceived no sufficient basis for substituting the judgment of the Court of Appeals for that of the District Court.

The District Court also found it difficult to believe that the tug engineer and deckhand were unable to remove the stern manhole cover with the power tools available. The District Court cited the evidence in the record that this manhole cover had been hand-tightened by an employee of petitioner only a few hours before the capsizing. However, the District Court stated it was unnecessary for it to resolve this factual dispute. Judge Friendly, in his dissenting opinion, saw no justification whatsoever for foreclosing the District Court's consideration of other claims of imprudent seamanship, particularly the tug crew's effort to remove the stern cover.

Reasons for Granting the Petition for a Writ of Certiorari

The standard of review followed by the majority opinion of the Second Circuit in this case is directly contrary to the standard set forth in this Court's decision in *McAllister* v. *United States, supra.* In that case, the Court of Appeals reversed the District Court's finding that a vessel's negligence was the proximate cause of the plaintiff's injury. This Court granted certiorari and subsequently reversed the Court of Appeals. On the question of review, this Court said at Page 20:

> "The first question presented is whether the Court of Appeals in reviewing the District Court's findings applied proper standards. In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil

> Procedure. * * * A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' ".

The majority opinion did not apply the clearly erroneous rule to the subject case which involve what Judge Friendly referred to in his dissenting opinion as "largely factual issues". The District Court found as a fact that the petitioner's crane barge could have been beached by respondents' tug on a nearby mud flat, thereby avoiding the capsizing. The District Court made this finding on the basis of the testimony of petitioner's two expert witnesses who described how the beaching could have been accomplished. Their testimony was not contradicted by respondents' tug captain who, as Judge Friendly pointed out in his dissenting opinion, admitted that he gave no thought to the beaching, at all. The District Court also found as a fact that the time interval between 9:35 p.m., when the attempt to open the stern manhole cover ceased, and 11:15 p.m., when the crane barge capsized, was sufficient time to accomplish the beaching. This finding was also based on the testimony of petitioner's two expert witnesses.

These were the evidentiary facts found to have been established by the District Court to which it applied the appropriate standard of conduct. The majority opinion rejected these evidentiary facts. In so doing, it did not apply the proper standard of reviewing the District Court's findings. It did not conclude that it was "left with the definite and firm conviction that a mistake had been committed". To reach such conclusion, the Court would have been required to reject the admonition of Rule 52(a) of the Federal Rules of Civil Procedure that due regard shall be given to the opportunity of the District Court to judge of the credibility of witnesses, in this case, petitioner's two expert witnesses.

There is a present conflict among the Circuits on the question of scope of review of a District Court's findings. The Second Circuit follows what it refers to as the rule of free review. *Romero* v. *Garcia & Diaz, Inc.*, (2 Cir., 1961) 286 F.2d 347, 355-356, cert. den. 365 U. S. 869, whereas the Sixth and Ninth Circuits follow the application of the clearly erroneous rule set forth in Rule 52(a), of the Federal Rules of Civil Procedure. *Imperial Oil Limited* v. *Drbik*, (6 Cir., 1956) 234 F.2d 4, 10, cert. den. 352 U. S. 941; *Pacific Tow Boat Co.* v. *States Marine Corp. of Delaware*, (9 Cir., 1960) 276 F.2d 745, 752. See also: *United States Steel Corporation* v. *Fuhrman*, (6 Cir., 1969) 407 F.2d 1143, 1145-46; *Rederi A/B Soya* v. *S.S. Grand Grace*, (9 Cir., 1966) 369 F.2d 159, 162; *Waterman Steamship Corporation* v. *Gay Cottons*, (9 Cir., 1969) 414 F.2d 724, 735 (Footnote).

Because the Second Circuit has adopted the practice of free review, contrary to *McAllister* v. *United States, supra*, the majority in the subject case erroneously sought to evaluate the testimony of petitioner's two expert witnesses, although it did not have the District Court's advantage of observing the demeanor of these witnesses. The majority rejected the testimony of petitioner's experts in part, because it thought that the experts assumed that the pump was not holding, whereas the facts were that the tug engineer and deckhand were unable to gain access with their pump to the flooding compartment of petitioner's crane barge. This observation by the majority shows a complete lack of understanding of the subject matter of the expert testimony.* The same result would occur whether the pump was in use and not holding, or was not in use at all, viz., the sea water level would continue to rise in the stern compartment of petitioner's crane barge.

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* This is understandable. In fact, the Court remarked in a footnote to its Opinion in *American President Lines Ltd.* v. *Towboat Seneca*, (2 Cir., 1967), 384 F.2d 511, 515, that its Judges are at best apprentice seamen.

This evaluation of expert testimony places the Court of Appeals for the Second Circuit in direct conflict with the Fourth Circuit which follows the long-standing rule that evaluation of opinion evidence is for the District Court which sees and hears the experts.

In *Connorton* v. *Harbor Towing Corporation*, (4 Cir., 1965), 352 F.2d 517, the Court of Appeals for the Fourth Circuit said at Page 518:

> "An appellate court is not the proper forum to refight a battle of expert witnesses. Even if we would have resolved the conflict in evidence differently, we will not interject this court into the fact finding process in the absence of clear error."

This language is all the more applicable to the subject case where there is no conflict among the expert witnesses.

The compelling need for review in this case is evident from the following remarks by Judge Friendly in his dissenting opinion:

> "By second-guessing the district judge in a case like this, we encourage appeals on what are largely factual issues, thus needlessly produce further work for ourselves, and impair the confidence which the district courts deserve. See C. Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751, 778-82 (1957)."

See also: *Pendergrass* v. *New York Life Ins. Co.* (8 Cir., 1950), 181 F. 2d 136, 138, where the Court said:

> "The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases."

Another reason why this Court should grant certiorari is to consider the Court of Appeals' failure to remand this

case to the District Court for the latter's consideration of other claims of imprudent seamanship, particularly the inability of respondents' tug crew to remove the stern manhole cover from petitioner's crane barge. The District Court found it difficult to believe that the tug engineer and deckhand were unable to remove the cover, but concluded that it was unnecessary to resolve this factual dispute because it found the respondents negligent for failing to beach the crane. Since the Court of Appeals has concluded that the respondents were not negligent, insofar as beaching is concerned, petitioner has been deprived of a ruling on the removal of the manhole cover which could have allowed the District Court to enter judgment in favor of petitioner. Judge Friendly, in his dissenting opinion, saw "no justification whatever" for this foreclosure of other claims of negligence by the majority.

Conclusion

It is respectfully submitted that the foregoing considerations warrant allowance of the writ sought by petitioner.

Respectfully submitted,

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APPENDIX

Opinion of United States District Court

[SAME TITLE]

CANNELLA, *J.*

Action to recover damages sustained by the plaintiff, M. P. Howlett, Inc., as a result of the capsizing and sinking of her floating crane (barge derrick) Howlett No. 6 while in the custody of the defendant tug Michael Moran owned and operated by the defendants, Tug Michael Moran, Inc. and Moran Towing & Transportation Co., respectively. Judgment for the plaintiff.

The instant action was tried before the Court, without a jury, solely on the issue of liability. Since the Court finds that liability has been established, the question of damages is reserved for the determination of a commissioner.

The Court finds jurisdiction over all aspects of the action.

Plaintiff entered into a contract with the defendants to tow the floating crane Howlett No. 6 from Port Richmond, Staten Island to Pier 9 Weehawken, New Jersey. The floating crane measured 90 feet by 38 feet and was unpowered and unmanned. It had a number of compartments the sternmost of which was a dry compartment some 16 feet in width, 38 feet long and 9 feet deep. This compartment had one means of entrance, a manhole cover in the vicinity of the starboard side about 6 feet from the stern. On the deck of the vessel was a diesel driven derrick. Running aft from the diesel engine was a three inch exhaust pipe which had a goose neck exhaust above deck and then proceeded through the stern compartment and vented through the stern bulkhead. This vent was about eighteen inches from the deck. The freeboard at the stern was two

and one-half feet and the vent was one foot above water level. The exhaust pipe within the compartment area had a silencer, also described as a muffler. Other compartments on the vessel contained fuel oil and water.

On August 11, 1964, the floating crane was working at Port Newark, New Jersey. Sometime after the end of the workday, at approximately 4:30 P.M., the floating crane was taken in tow by a Moran tug and brought to the Moran yard at Port Richmond, Staten Island. Thereafter, the tug Michael Moran took the floating crane in tow for delivery to the plaintiff's berth in Weehawken, New Jersey. The Michael Moran took the tow alongside stern forward and at about 7:15 P.M. proceeded north to the vicinity of Weehawken. Prior to arrival at Pier 9, at the tug captain's instructions, one of his deckhands had made a visual inspection of the tow's deck and had found the manhole covers in place and everything in order. When the tug and tow were in the vicinity of Day's Point, Weehawken, New Jersey, the captain of the tug noticed that the tow appeared to be down at the stern, that is, that she was a little deeper in the water than when the trip began. The captain sent a deckhand to check out this problem and he reported back with information that there might be water in the stern and that it was down, but that the tow otherwise appeared fine. This event occurred at approximately 9:00 P.M. when the tug and tow were approximately fifteen minutes away from Pier 9.

The captain proceeded toward Pier 9, where he berthed the tow on the south side of the pier at about 9:15 P.M. The berthing was accomplished with three lines and the tug was still made up on the offshore side of the tow, which continued to settle. With the tug's searchlight directed toward the starboard side of the stern end of the tow, the deckhand and the tug's engineer took a portable pump off the tug and brought it over to the crane. The tug

personnel assertedly attempted to remove the manhole cover at the stern compartment with the use of a crowbar and an eight pound maul, but were unable to remove the manhole cover, supposedly due to hardened cement. After this attempt, they turned their attention to the next manhole cover forward and succeeded in removing it. They found this to be a fuel compartment which the deckhand entered. He noticed a small amount of oil there, but no water. The engineer and deckhand then tried to remove a manhole cover on the port side without success and made a last effort to remove the stern compartment manhole cover with equal futility. At approximately 9:35 P.M., the attempts to open the manhole covers ceased, for the stern was awash. Altogether some twenty minutes of effort was expended trying to remove the manhole covers aboard the tow.

While his crew members were aboard the tow, the captain went ashore in an attempt to contact the owners of the crane. He was unsuccessful although he did contact his own dispatcher who was similarly involved. The captain returned to the mooring at about 10:00 P.M. The tow was still settling. Then the lines holding the tow became taut and it started to list. The captain made another attempt to contact the plaintiff during this time without avail.[1] At 11:15 P.M. conditions became so critical that the tug released its lines from the tow, which capsized, swinging alongside another barge tied up closer to the shore along the south side of Pier 9. Shortly after this, the tug abandoned the tow and proceeded with other matters.

Evidence was presented which placed mud-flats in the immediate vicinity of the moored vessels, starting near Pier 9 and extending south to the next pier. Whether the tug should have beached the crane there, and if so at what

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[1] The captain's actions during the period from 9:15 to 11:15 P.M. will be discussed in more detail *infra*.

point in time, and the proximate cause of the sinking of the floating crane, are the questions presented by the case at bar.

The defendants assert that the floating crane Howlett No. 6 was unseaworthy. The Court finds this to be so. Water was shipped into the stern compartment of the tow as the result of the unseaworthy condition of the muffler on the exhaust pipe in the stern compartment. This condition caused some water to ship in through the vent and once having gotten into the exhaust pipe to seep into the compartment through a crevice in the muffler caused by long standing corrosion and rust. This condition, in conjunction with the fact that the crane was being towed stern first, caused her to reach Pier 9 shipping water. In a contract for towage, the owner of the tow is responsible for the seaworthiness of that vessel and the owner of the tug for safe navigation and delivery.[2] However, a finding that the tow was not seaworthy does not end the Court's inquiry, for the Court finds that the unseaworthy condition of the floating crane was not the proximate cause of the damages which resulted from her sinking. Unseaworthiness of the tow alone will not absolve a tug of liability. For even assuming that the tow

> was unseaworthy when the voyage began, the tug is, nevertheless, liable for any loss attributable solely to its failure to exercise due care to save the boat and cargo from that damage which it could have prevented by taking reasonable and prudent action to protect the boat and cargo from sinking from whatever cause.[3]

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[2] *South, Inc.* v. *Moran Towing and Transportation Co.*, 360 F.2d 1002 (2d Cir. 1966); *Frederick Snare Corp.* v. *Moran Towing & Transportation Co.*, 195 F.Supp. 639 (S.D.N.Y. 1961).

[3] *Henry DuBois Sons Co.* v. *Pennsylvania R. Co.*, 47 F.2d 172, 174 (2d Cir. 1931). *See also Chemical Transporter, Inc.* v. *M. Turecamo Inc.*, 290 F.2d 496 (2d Cir. 1961).

Plaintiff must establish that the damages attributable to the sinking of its vessel were proximately caused by the tug's failure "to exercise such reasonable care and maritime skill as prudent navigators employ for the performance of similar service."[4] The burden of proof is of course on the plaintiff.[5] These applicable principles of law are not in dispute, but their application in this factual setting is the subject of some disagreement. This disagreement centers solely on whether the actions of the tug captain during the time he knew the crane was in dire straits was that of the reasonably prudent tug captain in the same or similar circumstances.

Plaintiff makes many claims of imprudent seamanship on the part of the tug captain asserted to be the proximate cause of the loss. Only one claim need be discussed for the Court finds that the failure of the tug captain to beach the floating crane Howlett No. 6 in the time period from 9:15 P.M. to 11:15 P.M. and to take no other steps to save her from capsizing and sinking during this time, breached the duty of prudent seamanship owed to the tow and was the proximate cause of the resultant damages.

Under the circumstances present in the case at bar, prudent seamanship required that the floating crane be beached after attempts to save her by pumping had failed through the inability of the tug's crew to reach the flooded areas. While it is unnecessary for the Court to resolve the factual dispute over the condition of the stern compartment manhole cover of the floating crane, the Court finds it difficult to believe that the deckhand and the engineer were unable to remove the cover with the power tools

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[4] *Stevens* v. *The White City*, 285 U.S. 195, 202 (1932).

[5] *South, Inc.* v. *Moran Towing & Transportation Co.*, 252 F.Supp. 500 (S.D.N.Y. 1965); *aff'd* 360 F.2d 1002 (2d Cir. 1966).

available.[6] Needless to say, had the cover been removed, the functioning portable pump, capable of pumping 700 gallons a minute, would have kept the tow afloat. But by 9:35 P.M. it was obvious that the cover could not be removed and that, with the stern already awash, pumping would most probably either never take place or be effective. At some point in the two hour period that night, it must have become obvious that the crane would capsize and sink if something were not done to get her out of the position she was in. This point in time cannot be stated with precise particularity, but it was at the point where a reasonable and prudent tug captain should have realized that pumping was no longer within the realm of possibility. At this point, it behooved the tug master to exercise that degree of care that a normal, reasonable and prudent tug master would employ under the same or similar circumstances. This conduct, and there is ample evidence in record to support this conclusion, required the captain to beach the floating crane in the nearby mud flats.

The evidence adduced at trial shows that a mud bottom was exposed at low tide in the area. The mud bottom is located in the slip south of Pier 9 and is about 150-200 feet in area. A sunken barge is aground there having been beached sometime ago. The expert testimony presented justifies a conclusion that not only should the tow have been beached that night, but that the beaching could have been accomplished in the exercise of reasonably prudent seamanship. The tug, from behind, could have pushed it on to the mud flats or could have used a reach boat between the crane and the tug. Further, the crane could have been beached between Piers 11 and 11a.

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[6] There is also evidence in the record that this manhole cover had been hand tightened before the crane made its voyage on August 11, 1964. Further, even were the cover hardened by cement, there is evidence that this would not necessarily have prevented removal with the tools present.

At least from the time of mooring the tow at Pier 9, it was obvious that the crane was in serious trouble and would capsize and sink if something were not done. For two hours, the situation worsened and yet nothing was done, save the efforts of the captain to contact the plaintiff for instructions. His use of this precious time during which the breaching could have been accomplished in a vain effort to get in touch with the owner for instructions on removing the stern manhole cover, did not constitute the exercise of prudent seamanship. Shortly after mooring, the crew found if was unable to remove the critical manhole cover and also that the stern was awash. At that point information concerning removal of the cover would have been useless. But in spite of his knowledge that the cover could not be removed and therefore pumping could not have been accomplished, the captain chose to make yet another trip to the dock to try for contact with the owner. In addition, the captain had already contacted his own dispatcher who was constantly attempting to reach the Howlett No. 6's owner.[7] His dispatchers could have continued to try to locate the plaintiff's representatives while the tug captain did what he was trained for, exercise prudent seamanship to save the crane from sinking. The Court cannot either find or infer any reason for the captain's conduct during the two hour period when the crane could have been saved. The prudent and reasonable conduct would have been to beach the floating crane on the mud flats and the failure to do so was the proximate cause of the damages incurred. To act in the fashion in which they did, constituted unseamanlike conduct on the part of the defendants' tug master and personnel.

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[7] The captain could have used his radio telephone to call for assistance and there is every reason to believe that had the dispatcher's efforts to contact the plaintiff's representatives been successful, word could have been flashed to the captain aboard his tug.

The defendants assert that to hold the captain to this standard of reasonableness imposes an unjust burden upon him. While recognizing that the proper course of conduct is much clearer after the fact, the Court is not holding a master or captain to a standard of perfection or infallability. This is not the situation which frequently confronts the courts in admiralty matters, where a vessel is truly *in extremis*, probably at sea, and with such a minimal amount of time involved in which to save her, that it is difficult to second-guess the captain of the vessel. Here, the tow and tug were berthed, the water and weather were calm and the captain was free enough in time to make at least two lengthy trips to the docks in an effort to reach the tow's owners. This does not present the picture of a sudden calamity at sea, nor does this pose the problem of spontaneous decisions required under the most extreme and serious conditions. There was time enough here for deliberation and the prudent, reasonable and required choice was to beach the crane. Failing so to do, the defendants must be adjudged liable for the damage which ensued.

In conclusion, the plaintiff has sustained its burden of proof and has established, by the fair preponderance of the credible evidence, that the failure of the crew of the Michael Moran to exercise such reasonable care and maritime skill as prudent seamen would employ in the same or similar circumstances, even in dealing with an admittedly unseaworthy vessel, was the proximate cause of the capsizing and sinking of the floating crane Howlett No. 6.

The above shall constitute the Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Settle an order.

Dated: New York, N.Y.
June 11, 1969.

JOHN M. CANNELLA
U.S.D.J.

Opinion of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 423—September Term, 1969.

(Argued January 19, 1970 Decided April 16, 1970.)

Docket No. 33635

M. P. HOWLETT, INC.,

Appellee,

against

TUG MICHAEL MORAN, TUG MICHAEL MORAN, INC. and MORAN TOWING & TRANSPORTATION CO., INC.,

Appellants.

Before:

MOORE, FRIENDLY and HAYS,

Circuit Judges.

Appeal from an admiralty judgment of the United States District Court for the Southern District of New York, John M. Cannella, *Judge*, after a two-day trial without a jury, in favor of plaintiff Howlett for damages sustained due to the capsizing of plaintiff's crane barge while in the custody of defendant's tugboat, the Michael Moran. Reversed.

KENNETH H. VOLK, New York, N. Y. (BURLINGHAM UNDERWOOD WRIGHT WHITE AND LORD, New York, N. Y.), *for Appellants.*

STEPHEN J. BUCKLEY, JR., New York, N. Y. (FOLEY & MARTIN, New York, N. Y.), *for Appellee.*

Opinion of the Court of Appeals for the Second Circuit

MOORE, *Circuit Judge*:

The tug Michael Moran, under the command of Captain William A. Morrissey, was engaged to tow the crane barge Howlett No. 6 from Port Richmond, Staten Island to Weehawken, New Jersey and berth it stern to shore on the south side of Pier 9. Toward the end of the trip Morrissey noticed that the draft of the barge had changed and it looked as if it were taking on water. He sent his deckhand to check, and his suspicions were confirmed. The cause of the barge's drawing water was not evident at that time but several days later it was discovered to be due to a rusted-out exhaust pipe which allowed water coming in the stern exhaust hole to leak into the stern belowdeck compartment. This defect rendered the barge unseaworthy, as the district court found. Nevertheless, negligence on the part of the tug was found to have caused the ensuing damage because Judge Cannella was persuaded that Morrissey could have saved her had he exercised prudent seamanship under the circumstances. Liability was found to arise from the following sequence of events.

Shortly after 9:00 o'clock that night Morrissey brought the leaking barge into its berth at Pier 9. His crew got out their pumping equipment, and sought a hole into the flooded compartment through which they could pump out the water. Using a sledge hammer and crow bar, the deckhand and engineer tried to open the deck plate (manhole cover) nearest to the leaking compartment. They were unable to open it, and gave up after approximately 20 minutes, because the stern area was by then awash. The crew then tried other deck plates, one of which they were able to open, but were unable to gain access to the waterfilled stern compartment. Their uncontradicted testimony is that, from the time of berthing (roughly 9:15 p.m.) to the time the tug cast off and the barge capsized, the two crew

members were engaged in seeking some way to pump out the water in the stern compartment.[1]

Meanwhile, Morrissey searched the dock area for someone who could tell them how to get into the flooded compartment or give them some advice as to how to keep the

[1] The testimony is somewhat confusing because the ambiguous phrasing of certain questions put to witnesses Pusty and Larsen (the tug's deckhand and engineer, respectively) produced some misleading or contradictory responses. For example, on direct examination Larsen was asked the following question and gave the affirmative response indicated:

> Q. To make it very clear, is it your testimony that at all times from the time at least when the barge—at all times when the barge was alongside the pier you were making these efforts?
> A. Yes.

Then followed questioning by the court, which revealed that, by Larsen's estimate, he and Pusty spent about 20 minutes attempting to get the starboard stern deckplate and one other deckplate off. The court apparently concluded from this that all efforts of any description terminated after 20 minutes, the point at which the starboard stern deckplate became awash. Morrissey testified, however, that he assisted the crewmen with a midship deckplate when he returned to the pier after 10:00 o'clock. Larsen had earlier testified that his and Pusty's efforts were continuous "all the time that we were alongside of her" and in the next breath estimated that they had "worked on it for about 20 minutes or more. It's hard to tell when you are in a situation like that."

Pusty's testimony likewise indicates that for most of the time the tug and barge were tied to the pier, he and Larsen were at least intermittently engaged in various activities directed at finding a way to keep the barge afloat. However, he, too, indicated that after 20 minutes they gave up on reaching the flooded compartment through the stern manhole covers.

We do not rely to any great extent on any of the time estimates contained in the testimony because the nearly five years intervening between accident and trial obviously clouded the recollection of everyone concerned. It is sufficient to observe that the testimony suggests that the crew stayed with the barge and tried everything they could think of to find a way to get their pumps to the water which was steadily sinking the barge.

barge afloat. Finding no one near the docks, he broke into the Howlett telephone shed near the dock and attempted to call the barge owner. He also communicated with his own dispatcher. Apparently the Howlett owner's telephone gave a busy signal for some time because an operator, eventually contacted either by the captain or his dispatcher, suggested that the phone probably was off the hook.[2] At any rate, Morrissey's approach to the problem was to keep his tug alonside the barge and tied to it while his men sought vainly to find a way to pump out the water, with the captain himself intermittently looking for outside help.

Two hours after the bertlring, at approximately 11:15 p.m., Morrissey decided that further efforts were futile, and that to stay alongside any longer would imperil the tug and its crew, because the barge had been listing toward the tug and the lines between the two were taut and humming. Morrissey ordered the deckhand to cast off. Two of the lines were loosed, and the barge keeled over toward the tug, which was backing out. The crane on the barge had been locked in vertical position, making the barge top-heavy once the water in the stern compartment had altered its stability, and the crane led the way as she capsized, missing the tug by about five feet.

Two expert witnesses (tug captains) for appellee Howlett testified that under any circumstances they would have tried to beach the barge. They testified that near the pier in question is an expanse of mud flats which are visible at low tide. It was not low tide when the above events occurred and Morrissey testified that all he could see was

[2] At the trial, Morrissey testified that "I must have dialed the number 10 or 15 times. The operator finally told me that one of the phones was apparently off the hook." In a deposition taken by Howlett in 1965, nine months after the capsizing occurred, Morrissey stated that his dispatcher had gotten that information from the operator and subsequently relayed it to him.

water when he entered into the area shortly after 9:00 p.m. He also testified that he had no knowledge of what lay under the surface in those waters and was apprehensive about the possibility of underwater wreckage or sunken objects along the shore outside the immediate area of the pier. Nevertheless, the experts were of the opinion that everyone operating in New York harbor should know about the flats and that the area was free of dangerous objects below the surface of the water. Judge Cannella agreed and found that the prudent course of action would have been to attempt to beach the barge when the captain discovered that he would be unable to pump the water out of the barge. Neither the expert witnesses nor the trial court were able to specify at what point in time this decision should have been made, nor did they indicate what effect the list of the already unstable, topheavy barge would have had on their judgment had they been in precisely the same circumstances in the same two-hour period. Appellant argues that after the list became severe, any attempt to beach the barge would have resulted in capsizing it and a consequent law suit for negligence in attempting to beach it under those circumstances. It appears from Morrissey's testimony, however, that he did not in fact consider beaching the barge, but concentrated his efforts on trying to pump her out or get some advice from the crane barge's owner. The district court determined that spending two hours looking for a hole to pump through and trying to call the owner was not the prudent thing to do under the circumstances. He held that failure to try one of the alternative methods of beaching the barge suggested by appellee's expert witnesses at the trial was negligence.

The conclusion that the captain was at fault rested on a finding by the trial court that a "reasonably prudent tug captain in the same or similar circumstances" would

have made an attempt to beach the Howlett No. 6, and the correlative finding that such an attempt would have been feasible. These crucial findings were based entirely on the testimony of Howlett's two expert witnesses, for there is no evidence outside this testimony that beaching was an alternative which a captain in these circumstances could or should have considered.

In faulting the master of a tug for choosing one course of action over others that may have been available in situations requiring judgment under conditions of abnormal stress, we must be careful to "judge the conduct of the master of a vessel in the light of the circumstances which he faced at that time . . . and not as they may have appeared to one looking back at them several hours or several days later." *Esso Standard Oil, S.A. v. S.S. Casbras Sul*, 387 F.2d 573, 582 (2d Cir. 1968). The transcript of the expert testimony in the case before us compels the conclusion that consideration was not given to the crucial factors which complicated Morrissey's decision at the time he was required to act, and therefore the assertions of these experts, based as they are on incomplete facts together with hindsight, cannot support the conclusion that the captain's failure to beach the barge was a failure to exercise "the reasonable discretion of an experienced master." *The Hercules*, 73 F. 255, 258 (2d Cir. 1896).

Both Captain Brucato and Captain Smith, the two expert tug masters produced by Howlett, agreed that the proper course of action initially was to try to pump the water out of the sinking barge. Neither was told that the tug Moran's crew were unable to gain access to the flooding belowdeck compartment, and both assumed throughout that the problem was that "the pumps weren't holding." Neither witness was able to provide a comprehending or comprehensible response to questions regarding the effect upon a normally competent tug master's judgment which

certain facts such as the severity of the barge's list, the effect of the vertically positioned crane boom and the rate at which the barge was sinking would obviously have under such circumstances. The transcript of cross-examination of both Brucato and Smith indicates that the experts either did not understand the questions put to them or they declined to answer them in favor of the rote response that "the pumps weren't holding and she should have been beached." Their testimony that an attempt to beach the barge was the only prudent thing to do under any circumstances sheds no light at all on the reasonableness of Morrissey's response to the unique emergency with which he was confronted at the time he acted. In the absence of consideration of the particular circumstances facing the captain in his hour of decision, a finding of negligence for his failure to beach the barge can only be based on hindsight. "The tug is not to be held responsible because the master, in an emergency, did not do precisely what, after the event, others may think would have been best." *The Hercules*, 73 F. 255, 258 (2d Cir. 1896).

Under normal conditions, negligence is shown by proving the tug's failure "to exercise such reasonable care and maritime skill as prudent navigators employ for the performance of similar service." *Stevens* v. *The White City*, 285 U.S. 195, 202 (1932). Conditions were not normal here, however, and it was not a failure of skill but at most an error in judgment under abnormal circumstances which was charged against the captain. Whether or not his action, or failure of action, was undertaken *in extremis*, see *The Oregon*, 158 U.S. 186, 204 (1895), the context of his decision was that of an emergency, as the trial court recognized: "At least from the time of mooring the tow at Pier 9, it was obvious that the crane was in serious trouble and would capsize and sink if something were not done." By 9:35 p.m. the stern was awash, the vertical

position of the crane boom could not be altered because the boom was locked in place and the ability of the barge to remain upright by itself even at that time was questionable, for by 11:15 it had become obvious that for some time the barge had been prevented from capsizing only by the lines fastening it to the tug. We conclude that these facts present a situation of sufficient peril and immediacy to require application of a standard of law different from the standard of ordinary maritime negligence relied upon by the trial court. The question of negligence must be resolved in light of the circumstances, and "when faced with an emergency, negligence does not flow from mere errors in judgment." The *S.S. Bellatrix*, 114 F.2d 1004, 1007 (3rd Cir. 1940); accord *The Imoan*, 67 F.2d 603, 605 (2d Cir. 1933); *The Hercules, supra*. The standard of judging the exercise of prudent seamanship here was tempered by the requirement for decision under very difficult, abnormal circumstances and the error, if there was error, was not negligence.

We, therefore, reverse upon the law and the facts the conclusion of the trial court that the conduct of the captain and crew of the Michael Moran was the proximate cause of the capsizing of the floating crane Howlett No. 6.

FRIENDLY, *Circuit Judge* (dissenting):

After the Howlett No. 6 was berthed at her pier at Weehawken on a clear summer night with a gentle wind, Captain Morrissey, his engineer and his deck-hand had a period of two hours to do something to help her. While the testimony was unclear, Judge Cannella was justified in concluding that only a small portion of that time was consumed in the appropriate but unsuccessful attempt to accomplish pumping. The idea that the crew acted reasonably thereafter in confining their efforts to notifying their dispatcher and ringing a telephone with a constant busy signal was

too much for the judge's rugged common sense. Even if we should think differently, as I do not, I perceive no sufficient basis for substituting our judgment for his.

Although this court has long held that a conclusion of negligence by a judge is not a "finding of fact" within the protection of F.R.Civ.P. 52(a), we have said that "it will ordinarily stand unless the lower court manifests an incorrect conception of the applicable law." *Cleary* v. *U. S. Lines Co.*, 411 F.2d 1009, 1010 (2 Cir. 1969). Our ruling in *Esso Standard Oil, S.A.* v. *S.S. Gasbras Sul*, 387 F.2d 573, 582 (2 Cir.), *cert. denied*, 391 U.S. 914 (1968), is not to the contrary; we held that the judge *had* applied a wrong conception, namely, by viewing the master's actions in light of hindsight. The judge here fully recognized his duty in this regard.

The testimony of the two tugboat captains, both intimately familiar with these waters, was that beaching was an idea that would have occurred to a reasonable master as soon as it became evident that pumping would not succeed. The judge's questioning made it clear that all work on the stern manhole cover was over by around 9:35 P.M., and Morrissey's first bout with the telephone had concluded by 10 P.M., more than an hour before the debacle. The case is not as if the tug personnel had chosen between beaching and pumping, the latter choice had proved unsuccessful, and they were sought to be held liable for making it. Neither is it like one where they considered beaching and rejected it as impractical. Captain Morrissey admitted that he gave no thought to beaching at all. Despite the majority's contrary statement, the trial court did not regard the captain as having been confronted with an emergency in which the failure to consider a possible course of action might be excusable; it specifically found there was time for deliberation. To be sure a negligent failure to decide to beach would not support a recovery unless How-

lett sustained its burden of showing that the effort would have succeeded. But this surely is a question of fact and I see no basis for deeming clearly erroneous the finding that this could probably have been accomplished if Morrissey had tried it around 10 P.M.

By second-guessing the district judge in a case like this, we encourage appeals on what are largely factual issues, thus needlessly produce further work for ourselves, and impair the confidence which the district courts deserve. See C. Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751, 778-82 (1957). I would therefore affirm the judgment. However, if it is decided to reverse, I see no justification whatever for attempting, as the majority apparently would do, to foreclose Judge Cannella's consideration of other claims of imprudent seamanship on which he found it unnecessary to pass; he particularly noted that it was "difficult to believe that the deckhand and the engineer were unable to remove the [stern manhole] cover with the power tools available."

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of April, one thousand nine hundred and seventy.

Present:

Hon. LEONARD P. MOORE,
Hon. HENRY J. FRIENDLY,
Hon. PAUL R. HAYS,
Circuit Judges.

M. P. HOWLETT INC., as owner of Floating Crane *Howlett No. 6*,

Plaintiff-Appellee,

v.

Tug *Michael Moran*, her engines, etc.,
TUG MICHAEL MORAN INC.,
MORAN TOWING & TRANSPORTATION CO., INC.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appellee.

A. DANIEL FUSARO,
Clerk

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

—o—

M. P. HOWLETT INC., as owner of Floating Crane *Howlett No. 6*,

Plaintiff-Appellee,

v.

Tug *Michael Moran*, her engines, etc.,

TUG MICHAEL MORAN INC.,

MORAN TOWING & TRANSPORTATION CO., INC.,

Defendants-Appellants.

—o—

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

LEONARD P. MOORE
PAUL R. HAYS
Circuit Judges

I respectfully dissent particularly as regards the foreclosure of other claims of negligence.

/S/ HENRY J. FRIENDLY
USCJ

June 2, 1970

Order Denying Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

—o—

M. P. HOWLETT INC., as owner of Floating Crane *Howlett No. 6*,

Plaintiff-Appellee,

v.

Tug *Michael Moran*, her engines, etc.,

TUG MICHAEL MORAN INC.,

MORAN TOWING & TRANSPORTATION CO., INC.,

Defendants-Appellants.

—o—

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

June 2, 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 54

M. P. HOWLETT, INC.,

Petitioner,

—against—

The Tug MICHAEL MORAN, TUG MICHAEL MORAN, INC., and MORAN TOWING & TRANSPORTATION CO., INC.,

Respondents.

BRIEF IN OPPOSITION

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of Counsel

IN THE

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OCTOBER TERM, 1970

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M. P. HOWLETT, INC.,

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Respondents.

BRIEF IN OPPOSITION

The Court of Appeals reversed the Trial Court "upon the law and the facts" (Pet. 16a). In both instances the Court was fully justified in its reversal.

Facts

Petitioner fails to mention that derrick barge HOWLETT No. 6 was unseaworthy, as expressly found by the District Court. Her stern compartment filled with water because of a leak which was hidden from view and unknown to those on tug MICHAEL MORAN (Pet. 4a). Thus, the emergency situation which arose as the tug and barge reached their destination at the south side of Pier 9, Weehawken was solely the fault of the barge.

Petitioner also fails to mention that efforts to pump the barge continued during the entire time the MICHAEL MORAN remained alongside the barge at the pier. Petitioner suggests that the tug did nothing from 9:35 P.M., when the after manhole cover came awash, until 11:15 P.M. when she capsized. But the District Court made no such finding. The record clearly shows that just the opposite is true. The Court of Appeals notes that "the uncontradicted testimony is that from the time of berthing (roughly 9:15 P.M.) to the time the tug cast off and the barge capsized, the crew members were engaged in seeking some way to pump out the water in the stern compartment" (Pet. 10a-11a). The reason they had such difficulty in opening the manholes was because they were cemented shut (C.A. Appendix 9a, 59a, 68a-9a).

Petitioner states that Captain Morrissey testified he "gave no thought to beaching at all" (p. 5),* again implying that he stood by and watched the barge settle and capsize without making any attempt to save her. Morrissey made it very clear however that he gave no thought to beaching for a very good reason, viz., because it was not a reasonable or even possible alternative course of action. As the tug and tow arrived at the unlighted and deserted Pier 9 the barge was in serious condition, her stern compartment flooding through her wasted internal exhaust pipe. Captain Morrissey testified that if he had thrown off the lines from the tug to the barge while alongside, the barge, with her high vertical boom and unstable flooded condition, would have capsized then and there. In fact, it was the

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*Actually those were not Morrissey's words, but the words of the trial judge who asked him: "Q. That thought [beaching] didn't come to your mind at all? A. No, sir" (C.A. Appendix 56a).

three lines from the tug to the starboard side of the barge that prevented her capsizing sooner. They were so taut that according to the tug's deck hand they were "humming" with the strain. Captain Morrissey therefore chose to stay alongside and hold the barge erect as long as possible, while continuing the efforts to find a way to pump her out (C.A. Appendix 49a, 52a, 62a).

It was only when the barge became so heavy with water that there was imminent danger of the tug's being pulled under that Capt. Morrissey gave the order to cast off at 11:15 P.M. When he did, the barge immediately capsized, missing the tug by a scant 5 feet (C.A. Appendix 50a, 62a, 70a).

In addition to these considerations Morrissey also had in mind that the draft of the MICHAEL MORAN was 14 feet whereas the draft of the barge was only 6 feet, making it impossible for the tug to get into water shallow enough to beach the barge without first going aground herself (C.A. Appendix 52a).

Finally, he could not be sure that there were no other more serious dangers from submerged, unseen objects such as logs, sunken piles etc. which might imperil the barge as well as the MICHAEL in any beaching attempt (C.A. Appendix 11a, 52a).

The only evidence in support of the beaching theory, as the Court of Appeals states, is the testimony of petitioner's two "experts". Neither was given all the facts. They were given no information about the instability of the barge, or the draft of the tug, or that the tug was making continuous efforts to pump the barge—although both witnesses conceded that pumping should be the very first action taken (C.A. Appendix 24-5a, 29a, 39-40a, 41a).

On these facts, the Court of Appeals rightly concluded that the District Court had erred in applying the wrong rule of law as to the standard of care required. The evidence in support of beaching was simply not sufficient to sustain a charge of negligence against the tug under all the circumstances.

Law

Petitioner attempts to inject legal grounds in support of the petition by raising the question of scope of review, asserting a conflict between the Second Circuit and other Circuits. The short answer is that this issue was never presented to the Court of Appeals. None of the arguments or cases cited by petitioner at page 6 first paragraph were presented below, not even in the Petition for Rehearing. This Court has long held that it will not review what the Court below did not decide. *Walters* v. *City of St. Louis*, 347 U.S. 231, 233; *United States* v. *New York Telephone Company*, 326 U.S. 638, 651 (note 18).

In any event, the asserted conflict between Circuits does not exist. The Court of Appeals reversed because:

> "We conclude that these facts present a situation of sufficient peril and immediacy to require the application of a standard of law different from the standard of ordinary maritime negligence relied upon by the trial court" (Pet. 16a).

The standard of conduct to be applied to given facts is universally treated as a question of law, the Ninth Circuit included, *Pacific Tow Boat Co.* v. *States Marine Corp. of Delaware* (9 Cir. 1960), 276 F.2d 745, 752; and see collected cases in 5 Moore's Federal Practice §52.03[1].

CONCLUSION

If Judge Friendly was correct when he said in his dissenting opinion below that this case deals with "largely factual issues", then it is *sui generis* and holds no broad legal significance meriting review by this Court. However, the true reason for reversal by the Court of Appeals was on the law, as demonstrated by the portion of the majority opinion last quoted above. The Court of Appeals found that the District Court had erroneously applied a standard of care requiring the use of 20-20 hindsight in an emergency situation due solely to petitioner's furnishing a barge whose unseaworthiness was not known or apparent. This does not present any significant legal question which requires this Court's attention or which needs final resolution here. The petition should therefore be denied.

Respectfully submitted,

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KENNETH H. VOLK
of Counsel

August 28, 1970.